In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-285

JOHN R. IVIMEY,

Petitioner,

v.

RICHARD H. BOURQUE,
d/b/a DICK'S AUTO BODY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner
320A Mountain Road
Englewood, N. J. 07631

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John R. Ivimey petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case, and its order denying a petition for rehearing entered on May 22, 1978.

OPINION BELOW

The opinion of the Court of Appeals (App. A, infra) is unpublished.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on May 1, 1978, and the order of the Court denying the petition for rehearing was dated and entered on May 22, 1978.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the amount of petitioner's claim was sufficient to meet the required jurisdictional amount of $10,000.00.

STATUTE INVOLVED

28 U.S.C. 1332(a)(1). App. B, p. A3.

STATEMENT

Petitioner filed suit in the United States District Court for the District of New Hampshire, alleging diversity of citizenship and a minimum amount in controversy of $10,000.00. A motion to dismiss for lack of jurisdictional amount was denied in the District Court. After trial the Court of Appeals dismissed the case for want of jurisdictional amount, although no party raised the jurisdictional issue, the record on appeal contained only those portions of transcripts pertaining to the narrow issues constituting grounds for appeal and no adequate opportunity was granted the parties to prepare for and argue the jurisdictional issue.

The complaint alleged that the defendant failed to properly care for bailed

property, breach of contract of repair, unlawful detention, conversion and that the defendant's acts and omissions were malicious, wanton, negligent and unlawful. Damages were claimed for the value of a Mercedes automobile on date of writ, or, in the alternative, that the defendant be ordered to restore the Mercedes to the condition in which it was delivered to the defendant, loss of use and enhanced compensatory damages for the aggravated nature of the defendant's conduct, a form of exemplary damages peculiar to New Hampshire.

At trial expert witnesses of both parties testified that a like Mercedes, depending upon condition, could be worth as much as $10,000.00. Defendant's principal expert witness testified that the Mercedes herein could be restored, if at all, only at a cost exceeding its market value when fully restored, and that the value of like Mercedes is constantly increasing.

Petitioner testified that he had notified the defendant soon after delivery of the Mercedes that he would not accept its redelivery until the defendant restored it to the condition in which it was delivered to the defendant, the Mercedes having already been harmed and was deteriorating during the period meanwhile when the defendant was asserting he was seeking, but having difficulty in obtaining, parts to make repairs.

REASONS FOR GRANTING THE WRIT

The law of the State of New Hampshire recognizes four separate elements of damages applicable to petitioner's claim.

First, a bailment imposes upon the bailee a duty to return bailed property to the bailor in as good condition as when received and is liable for all repairs rendered necessary by his own neglect or want of care. Mittersill Ski Lift Corporation v. State, 105 N.H. 219; 190 A2d 71 (1963) Alternatively the petitioner may recover the value of the Mercedes in a restored condition at date of writ. Canney v. Emerson, 82 N.H. 487; 136 A 139. As stated, supra, both parties' expert witnesses testified that the Mercedes could be worth as much as $10,000.00 when fully restored, and defendant's expert witness testified that the cost of restoration would exceed that amount. A jury question remains: what is the value of repairs and restoration at the time suit was brought, as determined by the jury's assessment of the condition of the Mercedes when the bailment commenced? The value of repairs and restoration is controlling, not, as the Court implies, the value of the Mercedes when the bailment commenced.

Second, in addition to damages for repair and restoration, petitioner is entitled to damages for loss of use. Copadis v. Haymond, 94 N.H. 103, 47 A2d 120, 18 ALR 3d 514n, 539 (1946). Copadis cites Campbell v. Portsmouth Hotel Company, 91 N.H. 390; 20 A2d 644, 646; 52 ALR 3d 438n, which states that loss of use is in general a matter of allowance when a bailee's negligence has caused the loss, asserting that no rule of law has the effect of leaving an automobile owner only partly compensated for his items of damage. Copadis moreover quotes Restatement: Torts, Sec. 928, which states that where harm to a chattel is adjudged a person is entitled to compensation for loss of use.

The period for which damages for loss of use were allowed, under the facts in Copadis, refers to the liability of a party to an automobile mishap who did not impede the prompt completion of repairs; this period has no reference to loss of use caused by a bailee's failure to repair harm resulting from his want of care, particularly, as herein, where the defendant was on notice as to the petitioner's refusal to accept redelivery unless the Mercedes was restored to its condition when delivered. The period of petitioner's loss of use is a jury question, based upon its assessment of all relevant circumstances. During the period when petitioner was forced to substitute other means of transportation and lacked the convenience and particular benefits of the Mercedes, he must be allowed the rental value or value of use thereof. 25 C.J.S. Damages; Sec. 83, 916-920; Sec. 77. Properly instructed, it is probable the jury would have awarded the petitioner a substantial sum for loss of use covering the many months the petitioner was deprived of the use of the Mercedes while the defendant feigned a search for parts and/or did nothing at all.

The Court asserts that the petitioner had a duty to mitigate damages, but does not state when the duty arose. Copadis, the sole case cited by the Court in the matter, does not support the Court; it does not limit damages to any period generally; it does not mention mitigation; but it does emphasize, citing Campbell, supra, the right to compensation in full for loss of use--the central principle pertinent to the case.

In fact, if the bailee continues in

possession of property, the bailor may treat the contract as continuing. Fast Bearing Company v. Koppers Company, 29 A2d 289, 290; 8 C.J.S., Bailments, 487; 144 ALR 1022, which also states that the bailee is not allowed to take advantage of his own wrong. The mere misuse of a chattel does not terminate a bailment, but renders it terminable at the will of a bailor. Wentworth v. McDuffle, 48 N.H. 402; 5 C.J., 1145, n96.

Nor had petitioner any occasion or duty to mitigate damages. The defendant never notified anyone that he was "unable" or unwilling to repair the Mercedes, nor that he had abandoned the parties' repair contract, nor that he refused to restore the Mercedes to the condition in which it was entrusted to him. There is no obligation on a promisee to minimize his damages until he actually knows he is suffering them because of a breach of contract by a promisor. He may assume the promisor will keep his contract. If there is no abandonment of contract of which the promisee is notified, he has no obligation to go in himself and attempt to save his property from rot and decay; if he does so, and brings an action for his expenses, he would likely be met with the defense that he is a volunteer and had prevented the promisor from performance. The petitioner had a right to rely upon the defendant performing his duty. Citizens National Bank v. Hernsdorf, 96 N.H. 389, 394; 25 C.J.S., damages, 701.

Third, at the discretion of the jury the petitioner is entitled to enhanced compensatory damages because of the aggravated nature of the defendant's conduct. Where there is malice or oppression, compensating

damages may be increased to compensate for the vexation and distress caused by the character of the defendant's conduct. Vratsenses v. N.H. Auto, Inc., 112 N.H. 71, 72; 289 A2d 66 (1972).

Contrary to the Court's opinion, the complaint alleges affirmative allegations as to the defendant's conduct in Paragraph Nos. 4, 5, 7 and 9, in which it is alleged that the defendant never responded to the petitioner's correspondence, caused the Mercedes to deteriorate excessively, conducted himself maliciously, wantonly, negligently and unlawfully and converted the Mercedes to his own uses and purposes. As well, the Court had no way of knowing what relevant facts, conditions and affirmations were shown at trial, and none of the cases cited by the Court are supportive of its contentions as to New Hampshire law. All the rules require is a "short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it stands, as stated by Justice Black for a unanimous court in Conley v. Gibson, 355 U.S. 41, 47; 78 Sup. Ct. 99, as cited in Moore's Federal Practice 2d, Vol. 2a, p. 1695. The complaint conformed in all respects to Rule 8 of the Federal Rules of Civil Procedure, which calls for "simple, concise and direct" averments and provides that "all pleadings shall be construed as to do substantial justice." It is fundamental that the complaint must be construed in favor of the plaintiff. Securities & Exchange Commission v. Gulf International Finance Corporation. 223 F. Supp. 987 (1963).

Fourth, petitioner may be awarded damages which accrue after the commencement

of suit, as well as those accrued at that time. Mansfield v. Federal Services Finance Corporation, 99 N.H. 352, 111 A2d 322. Each of the prior elements of damage could thus be increased by the jury, since, as testified by the defendant's own expert witness, a Mercedes such as the petitioner's is increasing in value, loss of use could be construed to be continuing and petitioner's vexation and distress goes on.

There is simply no basis for the Court's assertions that to a certainty petitioner's claim cannot exceed $10,000.00, as required for dismissal by St. Paul Indemnity Company v. Red Cab Company, 303 U.S. 276, nor that there is no claim that the Mercedes could be worth anything like $10,000.00 under any circumstances, nor that enhanced compensating damages must be affirmatively plead, nor that loss of use is limited to any period of time in the case of a bailment, breach of contract of repair or unlawful detention of property. The District Court, having examined the available evidence and critically evaluated petitioner's claims and the testimony of the parties on motion to dismiss and motion to amend the complaint, cited St. Paul and Vratsenes, respectively, in denying the motion to dismiss and ruling that enhanced compensating damages may be awarded where malice exists.

Nor is there any basis in the record on appeal, or elsewhere, for the Court's speculations as to the "facts," particularly as to petitioner's implied acquiescence in the defendant's improper storage of the Mercedes, a wrong central to the complaint, and a defense not even suggested by the defendant. Moreover, all relevant facts are in dispute and are jury questions.

The only possible issue here is whether the petitioner had a duty, at a certain point in time, to enter upon the defendant's premises, seize the Mercedes, have it towed away and restored and then sue the defendant for accrued damages and expenses. If such a duty arose, its point in time and the damages then accrued are questions for jury determination.

However, the Fast Bearing, Wentworth and Citizens National Bank cases, supra, clearly establish that the petitioner had a right to rely upon the defendant performing his duty, treat the bailment as continuing and had no obligation to minimize damages, even if he had been able to lawfully enter upon the defendant's premises and do so without providing the defendant with the defense that petitioner was a mere volunteer and had himself prevented the defendant from performance.

By any rationale there is no doubt but that damages in excess of $10,000.00 could readily be awarded. The issue should be clarified by this Court to spare future litigants and the District Courts the time and expense of pointless lawsuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John R. Ivimey
Petitioner
320A Mountain Road
Englewood, N. J. 07631

APPENDIX A

(NOT FOR PUBLICATION)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 77-1515

Entered May 1, 1978

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JOHN R. IVIMEY,

Plaintiff, Appellant,

v.

RICHARD H. BOURQUE,
d/b/a DICK'S AUTO BODY,

Defendant, Appellee.

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Before:

Coffin, Chief Judge
Aldrich and Campbell, Circuit Judges

Per Curiam. In March, 1970, plaintiff, whose Mercedes Benz had broken down on the road, left it at the defendant's place of business, defendant allegedly to obtain parts and repair it. Allegedly plaintiff returned in June, and found nothing had been done, and the car much deteriorated. Suit was brought in March, 1976, a few

days before the running of the statute of limitations. At the conclusion of trial in September of 1977 the jury returned a verdict in defendant's favor.

This being a diversity action, our first inquiry must be to our jurisdiction -- viz., existence of the jurisdictional amount of $10,000. See Jimenez Puig v. Avis Rent-a-car System, No. 77-1491, 1 Cir., April 24, 1978. Plaintiff asserts the car was reasonably worth in March, 1970, $1,500, and would be worth more today, if it had been maintained. Passing the fact that the car was left outdoors, to plaintiff's knowledge, and defendant took no obligation to store it indoors, there is no claim that, no matter how well it had been repaired or maintained, it could be worth anything like $10,000 under any circumstances.

Plaintiff also claims loss of use. However, a party who seeks damages has an obligation to mitigate them. In the case of a replaceable item like an automobile, these are interim damages that cannot extend beyond when it would have been reasonable to effect replacement. Plaintiff cannot claim the full value of the car, and, at the same time, loss of use for any appreciable period of time or amount of money. Cf. Copadis v. Haymond, 1946, 94 N.H. 103, 47 A.2d 120.

Finally, plaintiff claims enhanced compensatory damages for the aggravated nature of defendant's conduct, a form of exemplary damages peculiar to New Hampshire. Vratsenes v. New Hampshire Auto, Inc., 1972, 112 N.H. 71, 289 A.2d 66. Such damages are recoverable only in exceptional cases, and should not be considered in order to confer jurisdiction unless affirm-

ative allegations, as distinguished from mere conclusions, support them. Hanna v. Drobnick, 6 Cir., 1975, 514 F.2d 393; Zahn v. International Paper Co., 2 Cir., 1972, 469 F.2d 1033, 1033 n.1, aff'd, 414 U.S. 291; Givens v. Grant Co., 2 Cir, 1972, 457 F.2d 612, vacated and remanded on other gr'ds, 409 U.S. 56. They are not sufficiently alleged even in the amended complaint under New Hampshire law, see Vratsenes, ante, nor in any way shown at trial.

In determining the existence of the jurisdictional amount, the court must look beyond the figures in the complaint and determine, as a matter of reality, whether to a certainty plaintiff's claim cannot exceed $10,000. St. Paul Indem. Co. v. Red Cab Co., 1938, 303 U.S. 276; see Jimenez Puig, ante; Randall v. Goldmark, 1 Cir., 1974, 495 F.2d 356, 360-61, cert. denied, 419 U.S. 879. Making every reasonable allowance in favor of the plaintiff in this case, we cannot envisage anything approaching the jurisdictional amount. Absence of jurisdiction may be determined at any stage. Security Mut. Life Ins. Co. v. Harwood, 1 Cir., 1927, 16 F.2d 250; Clark v. Paul Gray, Inc., 1939, 306 U.S. 583; Givens v. Grant Co., ante. The case must be dismissed.

APPENDIX B

28 U.S.C. 1332(a)(1), p. 2. The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between citizens of different states.